

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1672CV00467

CHRISTINA STEVENS, TRUSTEE OF
THE LIGHTHOUSE REALTY TRUST,
Plaintiff

Vs.

TOWN OF BOURNE ZONING BOARD
OF APPEALS, JOHN E. O'BRIEN, WADE
M. KEENE, HAROLD KALICK,
TIMOTHY M. SAWYER, LEE M. BERGER,
KATHLEEN BRENNAN a/k/a KAT
BRENNAN, AMY KULLAR, THOMAS
C. ARMSTRONG, HEATHER ALDEN,
AND MICHAEL MCHONE, AS
THEY CONSTITUTE THE TOWN OF
BOURNE ZONING BOARD OF
APPEALS, and JAMES F. MOLLOY,
Applicant,
Defendants

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**THE PLAINTIFF, CHRISTINA STEVENS, TRUSTEE OF THE LIGHTHOUSE
REALTY TRUST'S OPPOSITION TO THE DEFENDANT, JAMES F. MOLLOY'S
MOTION FOR POST-TRIAL PRELIMINARY INJUNCTION**

Now comes the Plaintiff, Christina Stevens, Trustee of the Lighthouse Realty Trust (hereinafter "LRT"), and respectfully opposes the Defendant, James F. Molloy's Motion for Post-Trial Preliminary Injunction. The Defendant's Motion must be denied because there is no threat of irreparable harm should the motion be denied and further, because the requested injunctive relief is overreaching.

INTRODUCTION

The Plaintiff, LRT, is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck, Bourne, Massachusetts ("Premises" or "Property"). The Defendant, James F. Molloy,

(hereinafter "Molloy"), is an abutter to the Property as he, in his capacity as Trustee of the 2 Westview Street Realty Trust, owns 2 Westview Street, Town of Bourne, Massachusetts.

In a prior Land Court Action, LRT entered into a Settlement Agreement with the Town of Bourne as to the permitted use of the Property. Molloy appealed the terms of the Agreement to the ZBA which granted Molloy's appeal in essence overruling the Agreement between LRT and the Town of Bourne. LRT appealed said ZBA decision to the Barnstable Superior Court which issued judgment in favor of Molloy. This Plaintiff is currently appealing the 2018 judgment of this Honorable Court. By motion, the Defendant has sought to enjoin the Plaintiff from "allowing weddings or wedding receptions or similar events" while the appeal is pending.

PROCEDURAL BACKGROUND

Prior Land Court Action- Town of Bourne v. Stevens (C.A. No. 15MISC000232)

The case at bar began long before the Plaintiff's Superior Court action in which she sought to overturn the ZBA Decision. On or about June 25, 2015, the Town of Bourne commenced an action through its duly appointed Building Inspector and Chief Zoning Enforcement officer, Roger Laporte, against the Plaintiff, LRT, in the Massachusetts Land Court, Docket No. 15MISC000232 (HPS), requesting that the Court issue declaratory judgment declaring that LRT was prohibited by the Bourne Zoning By-law from utilizing the Premises for commercial purposes, including offering to rent and renting the Premises for receptions, including wedding receptions. ("Land Court Action").

On June 2, 2016, LRT entered into an Agreement with the Town of Bourne, which was approved and signed by the Board of Selectmen and the attorney for the Town of Bourne after public hearing, in full settlement of the dispute underlying the Land Court Action (hereinafter referred to as "Agreement"). (See Agreement attached as Exhibit "A"). As a result of said

Agreement, the parties filed a Stipulation of Dismissal dismissing the Land Court Action with prejudice, without costs and with all rights of appeal waived on or about June 8, 2016.

In accordance with the Agreement, the Building Inspector issued a new Enforcement Order dated June 23, 2016, which provided that, "[p]ursuant to an Agreement entered on June 2, 2016, by and between the Town of Bourne and Christina Stevens, Trustee of The Lighthouse Realty Trust and approved by the Massachusetts Land Court, I, Roger Laporte, Zoning Enforcement Officer, hereby vacate the current CEASE and DESIST order, and substitutes in its place this ORDER that reflects the term of the Agreement," and then restated the terms set forth in the Agreement. (See Cease and Desist Order dated June 23, 2016 attached as Exhibit "B"). On July 8, 2016, Molloy appealed Laporte's revised cease and desist order to the Board of Appeals.

The Town of Bourne Zoning Board of Appeals voted to grant Molloy's appeal, and overturned the 2016 Enforcement Order and ordered it be substituted with the 2013 Enforcement Order. (See Enforcement Order dated January 15, 2013 attached as Exhibit "C"). On or about October 4, 2016, LRT filed its Complaint in the Barnstable Superior Court, appealing the ZBA's September 14, 2016 decision. (See Complaint). To date, the Plaintiff has not been served with a Cease and Desist Order since the June 23, 2016 Order. (See Affidavit of Christina Stevens attached as Exhibit "D").

Superior Court Action

On or about October 3, 2016, the Plaintiff, LRT, filed her Complaint in the Barnstable Superior Court appealing the ZBA decision as violative of Massachusetts zoning law because the decision exceeded the power of the Zoning Board of Appeals and further, was arbitrary and capricious. The Plaintiff further appealed from said decision as it was in error and exceeded the

authority of the Zoning Board of Appeals because the Plaintiff previously entered into a Settlement Agreement with the Town of Bourne as to use of the property, located 0 and 1 Lighthouse Lane, Wing's Neck, Bourne, Barnstable County, Massachusetts.

A jury waived trial was commenced and completed on August 22, 2018; the matter was taken under advisement. On November 11, 2018, the Honorable Judge Kenneth J. Fishman entered his Findings of Facts and Rulings of Law as well as Judgment for the Defendants, Town of Bourne Zoning Board of Appeals and Molloy.

STATEMENT OF FACTS

The facts set forth are found in the Findings of Fact, Conclusions of Law and Order of Judgment of this Court following the Trial. (See Exhibit "E")

The Plaintiff, LRT, is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck, Bourne, Barnstable County, Massachusetts, also known as Parcel Nos. 14 and 20 on Assessor's Map 45 having obtained title by Quitclaim Deed recorded at the Barnstable County Registry of Deeds at Book 17933, Page 320 on November 17, 2003. During LRT's ownership, the Premises has been used for residential rental purposes. Third parties who rent the Property have held events, including weddings, on the Premises. LRT does not accept additional payment from renters who choose to hold events on the Property, and is in no way involved with planning, preparing, or hosting any such events on the Property.

On June 2, 2016, LRT entered into the Agreement with the Town of Bourne, which was approved and signed by the Board of Selectmen and the attorney for the Town of Bourne after public hearing, in full settlement of the dispute underlying the Land Court Action. As a result of said Agreement, the parties filed a Stipulation of Dismissal dismissing the Land Court Action with prejudice, without costs and with all rights of appeal waived on or about June 8, 2016.

Additionally, in accordance with the Agreement, the Building Inspector issued a new Enforcement Order dated June 23, 2016, which provided that, "[p]ursuant to an Agreement entered on June 2, 2016, by and between the Town of Bourne and Christina Stevens, Trustee of The Lighthouse Realty Trust and approved by the Massachusetts Land Court, I, Roger Laporte, Zoning Enforcement Officer, hereby vacate the current CEASE and DESIST order, and substitutes in its place this ORDER that reflects the term of the Agreement," and then restated the terms set forth in the Agreement.

On July 8, 2016, Molloy appealed Laporte's revised cease and desist order to the Zoning Board of Appeals, pursuant to Section 8 of Chapter 40A. A public hearing on Molloy's appeal to the Board of Appeals was held on September 7, 2016. The Town of Bourne Board of Appeals voted to grant James F. Molloy's appeal, and overturned the 2016 Enforcement Order and ordered it substituted it with the 2013 Enforcement Order. To date, no new Cease and Desist Order has been received by the Plaintiff. (Exhibit "D"). The appeal of the Superior Court judgment is currently pending. Prior to judgment being issued, the Plaintiff entered into two rental agreements in which the renters wish to have a wedding reception. The terms of the event are within the parameters set forth in the Agreement with the Town and the requisite notice has been given. (See Exhibit "D"). The Plaintiff has not entered into any further rental agreements with individuals seeking to have a wedding. (See Exhibit "D").

ARGUMENT

- I. THE DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE THERE IS NO THREAT OF IRREPARABLE HARM SHOULD THE MOTION BE DENIED.

Applications for postjudgment injunctions pending appeal are subject to the same standards as those for preliminary injunctions. See *C.E. v. J.E.*, 472 Mass. 1016, 1017, 37 N.E.3d

623 (2015). Accordingly, the moving party must ordinarily make three showings to obtain an injunction: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm if the injunction is denied; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party. See *Doe v. Superintendent of Schs. of Weston*, 461 Mass. 159, 164, 959 N.E.2d 403 (2011).

In considering a motion for preliminary injunction," the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party." *Packaging Industries Group, Inc. et al. v. Paul E. Cheney*, 380 Mass. 609, 616 (1980) What matters as to each party is not is the risk of such harm in light of the party's chance of success on the merits. *Id.* "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.* at 617, citing *Leubsdorf*, *The Standard for Preliminary Injunctions*, 91 Harv.L.Rev. 525, 540-544 (1978). 540-544 (1978).

In the case at bar, the Defendant has not alleged any irreparable harm should his Motion be denied. The Defendant merely claims the weddings have "an intrusive effect on the Defendant Molloy and the other residents' peaceful enjoyment of the area . . ." and "the loss of even one peaceful summer's day can never be recovered." These allegations of a loss of enjoyment of one's property do not amount to a threat of irreparable harm, especially to the Defendant who annually throws a Fourth of July Party at his residence and to residents who have also held wedding receptions and other events over the years. (See Findings of Fact #6). Since there has been no evidence of irreparable harm presented, this Court need not proceed to the next prong of

analysis, i.e. the balance of the risk of harm. Based on the foregoing, the Plaintiff respectfully requests the Motion be denied.

II. THE DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE THE REQUESTED INJUNCTION IS OVERREACHING THE ORDER OF JANUARY 15, 2013 WHICH STILL HAS NOT BEEN REISSUED TO THE PLAINTIFF.

The Defendant has sought to enjoin the Plaintiff from "allowing weddings or wedding receptions or similar events" while the appeal is pending. However, the January 15, 2013 correspondence from Roger Laporte, Inspector of Buildings to Elizabeth Gillis states "the use and marketing of residential property of weddings constituted a commercial use." It goes on to state "it is a violation of the Zoning By-laws to use the property for wedding receptions".

Despite the language in the January 15, 2013 correspondence which the Defendant seeks to enforce, the Defendant requests an order preventing all weddings or wedding receptions or similar events on the property. This request is overreaching on two grounds. First, it goes beyond the scope of the order and seeks to prevent "similar events". This Honorable Court in its judgment affirmed the ZBA's decision which ordered the January 15, 2013 Cease and Desist Order reissued. If this order were reissued (to date, it has not been), the Defendant, at best, would be able to enjoin weddings and wedding receptions only, not "similar" events. Even if the Defendant prevails in the Massachusetts Appeals Court the most he will receive is a reissuance of that order, no more. The 2013 correspondence, by no means, speaks to renters having guests, barbeques, family dinners or more importantly, the Plaintiff conducting any of these events on her own Property. The Defendant seeks to halt all such activities by preventing "similar events" which are not prohibited by the January 15, 2013 Cease and Desist or the Town of Bourne Zoning By-Laws.

Second, the Defendant seeks to enjoin all events whether or not commercial in nature.

Commercial use is defined as "use in connection with or for furtherance of a profit-making enterprise." *Black's Law Dictionary*, 6th Ed. 1991. The Defendant seeks to enjoin all activity on the Property even if there is not a profit made or a fee for the use of the Property. This prevents the Plaintiff from using her Property as she wishes. If the Defendant's Motion is allowed, the Plaintiff will be prevented from utilizing her property as others in the area are permitted.

Since the Defendant's Motion seeks to enjoin behavior beyond the 2013 Order and the scope of the relevant By-Laws, the Defendant's Motion must be denied. However, should this Court be inclined to order an injunction prohibiting certain activity on the Plaintiff's Property, the order must be limited to activity of a commercial nature where one has paid for the use of the property.

CONCLUSION

The Defendant's Motion for Preliminary Injunction must be denied because he has failed to establish the threat of irreparable harm should the Motion be denied. Further, the requested relief must be denied as it is overreaching and seeks to enjoin behavior beyond the scope of the not yet reissued, 2013 Enforcement Order.

Respectfully submitted,
For the Plaintiff,
CHRISTINA STEVENS, TRUSTEE
OF LIGHTHOUSE REALTY TRUST
By her attorneys,
WYNN & WYNN, P.C.



Thomas J. Wynn BBO#535860
Dina M. Swanson BBO#654540
90 New State Highway
Raynham, MA 02767
(508) 823-4567
twynn@wynnandwynn.com
dswanson@wynnandwynn.com

Dated: May 3, 2019

CERTIFICATE OF SERVICE

I, Dina M. Swanson, Attorney for the Plaintiff, Christina Stevens, Trustee of the Lighthouse Realty Trust, in this action, hereby state that on May 3, 2019, pursuant to Superior Court Rule 9A, I forwarded the original and a copy of the Plaintiff, Christina Stevens, Trustee of The Lighthouse Realty Trust's Opposition to the Defendant, James F. Molloy's Motion for Post-Trial Preliminary Injunction, to the Defendant, James Molloy, in this action, through counsel, by first class mail as follows:

Jonathan D. Fitch, Esquire, P.O. Box 1346, Sandwich, MA 02563



Dina M. Swanson BBO#654540

EXHIBIT "A"

AGREEMENT

This AGREEMENT, entered into this 2 day of June, 2016 by and between the Town of Bourne (hereinafter "Bourne") and Christina Stevens, TRUSTEE OF THE LIGHTHOUSE REALTY TRUST (hereinafter Stevens).

WHEREAS, Bourne commenced litigation in the Massachusetts Land Court Civil Action No. MISC 000232 against Stevens requesting the court issue a declaratory judgment declaring that Stevens is prohibited by the Zoning By-Law from renting the property at 0 & 1 Lighthouse Lane, Wings Neck, Bourne (hereinafter "Property" or "Premises"), for functions and/or receptions including wedding receptions;

WHEREAS, Stevens denies that her use of the Premises is in violation of the Bourne Zoning By-Laws.

NOW THEREFORE to resolve their differences regarding this matter, Bourne and Stevens agree to the following which does not preclude the Town from prospectively enforcing its Zoning By-Laws in accordance with its provisions:

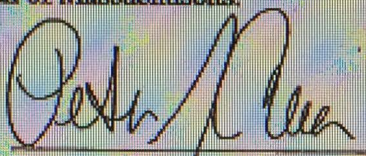
1. A "function" shall be an event in excess of twenty-five (25) guests hosted by a renter of the premise; a "renter" shall be an individual or individuals occupying the Property pursuant to a written rental agreement.
2. Stevens agrees to limit the number of functions on the Property to four (4) functions per year: one per month for the months of May, June, September and October and to limit the number of guests to one hundred (100).
3. Stevens agrees to require any renter of the Property who holds a function to clean the area following the function; should any renter fail to do so, Stevens will insure the Premises is free from debris after a function.
4. Stevens agrees to discuss with any renters prior to a function to establish the property lines to which the guests are to remain during functions;
5. Stevens agrees to require entertainment at renters' functions to be shut down at 10:00 p.m.;
6. Stevens agrees to require that guests of any function be prohibited from using the beach; however, any renter shall be permitted to use the beach on any day during his/her rental.
7. Stevens agrees to require a detailed police officer for any function that exceeds fifty (50) guests and further agrees to instruct the hired detail police officer as to the parameters that the guests are allowed to visit during the function, where cars are to be parked, and also to make clear that the beach is off limits for guests during functions.
8. Stevens agrees to notify the Town Administrator in writing thirty days in advance of

any function which will exceed fifty (50) guests.

9. Bourne agrees to dismiss the Massachusetts Land Court Civil Action No. MISC 000232, with prejudice;
10. Bourne agrees to vacate the current Cease and Desist Order on the Property and to substitute in its place a Cease and Desist Order that reflects the terms of this Agreement.
11. The parties hereto understand and acknowledge that this Agreement contains the entire agreement between the parties hereto, and the terms of this Agreement are contractual and not a mere recital. Further this Agreement is deemed to be made in the Commonwealth of Massachusetts and it and the legal relations between the parties hereto shall be governed and construed according to the Laws of the Commonwealth of Massachusetts.

BOARD OF SELECTMEN TOWN OF BOURNE


Stephen F. Mealy



Peter J. Meier


Donald J. Pickard

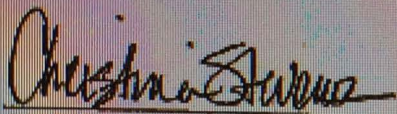

George G. Slade


Michael A. Blanton

Town of Bourne by its attorney


Robert S. Troy
BBO#503160
Troy Wall Associates
90 Route 6A
Sandwich, MA 02563
(508) 888-5700
rst@troywallassociates.com

Dated June 2, 2016



Christina Stevens, TRUSTEE OF THE LIGHTHOUSE REALTY TRUST

Christina Stevens, TRUSTEE OF THE LIGHTHOUSE REALTY TRUST
by her Attorney



Dina M. Swanson

BBO#654540

Wynn & Wynn P.C.

90 New State Highway

Raynham, MA 02767

(508)823-4567

Dated May 27, 2016

EXHIBIT "B"

JUN 27 2016



TOWN OF BOURNE
INSPECTORS' DEPARTMENT
24 Perry Avenue
Buzzards Bay, MA 02532
Tel. 508-759-0615



June 23, 2016

Christina Stevens Trustee
Lighthouse Realty Trust
22 Red Gate Lane
Southboro, MA 01772

Re: Enforcement Order - Weddings at 0 and 1 Lighthouse Lane, Pocasset MA,
Map 45 Parcel 20

Ms. Stevens:

Pursuant to an Agreement entered on June 2, 2016, by and between the Town of Bourne and Christine Stevens, Trustee of "The Lighthouse Realty Trust" and approved by the Massachusetts Land Court. I, Roger Laporte, Zoning Enforcement Officer, hereby vacate the current **CEASE and DESIST** order, and substitute in its place this **ORDER** that reflects the term of the "Agreement".

1. A function shall be an event in excess of Twenty five (25) guests, hosted by a renter of the premises; a "renter" shall be any individual or individuals occupying the property pursuant to a written rental agreement.
2. Christine Stevens shall limit the number of functions on the property to four (4) functions per year. One per month for the months of May, June, September and October, and to limit the number of guests to One-hundred (100).
3. Christine Stevens shall require any renter of the property who holds a function to clean the area following the function. Should any renter fail to do so, Christine Stevens will insure the premises is free from debris after a function.
4. Christine Stevens shall discuss with any renters prior to a function, to establish the property lines to which the guests are to remain during functions.
5. Christine Stevens shall require entertainment at renters' functions to be shut down at 10:00 p.m.

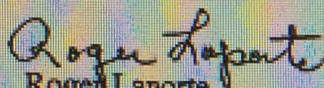
6. Christine Stevens shall require that guests of any function be prohibited from using the beach. However, any renter shall be permitted to use the beach on any day during his/her rental.

7. Christine Stevens shall require a detailed Police Officer for any function that exceeds Fifty (50) guests, and further agrees to instruct the hired detail Police Officer as to the parameters that the guests are allowed to visit during the function; where cars are to be parked, and also make clear that the beach is off limits for guests during the functions.

8. Christine Stevens shall notify the Town Administrator in writing Thirty (30) days in advance of any function which exceeds Fifty (50) guests.

This decision may be appealed pursuant to Chapter 40A M.G.L.

If you have any questions, Please contact me at 508-759-0615 ex. 1334


Roger Laporte,
Inspector of Buildings

Kd

Cc: Town Administrator

Town Counsel

Attorney Dina M. Swanson, Wynn & Wynn P.C.
99 New State Highway
Raynham, MA 02767

Attorney Jonathan D. Fitch, MacNeil & Fitch
Barnstable House
3010 Main Street
Barnstable, MA 02630

EXHIBIT "C"



TOWN OF BOURNE
INSPECTORS' DEPARTMENT
24 Perry Avenue
Buzzards Bay, MA 02532
Tel. 508-759-0615



January 15, 2013

Elizabeth Gillis
c/o Christina Stevens
PO Box 694
S. Dennis, MA 02659-0694

91 7199 9992 7031 8157 9180

Re: 0 & 1 Lighthouse Lane

To Whom it May Concern:

Please be advised that we are in receipt of a recent Land Court decision (20 LCR44, misc 08-380468 Barnstable, ss), in which the determination was made that the use and marketing of residential property for weddings constituted a commercial use.

Your property (as listed above) is in a residentially zoned district in the town of Bourne. As such, it is a VIOLATION of the Zoning Bylaws to use that property for weddings and or wedding receptions.

This letter will constitute both a warning to you and my decision as Zoning Enforcement Officer.

Please be advised that this decision may be appealed to the Zoning Board of Appeals pursuant to Chapter 40A M.G.L.

If you have any questions, Please contact me at 508-759-0615 ex. 3.

Roger Laporte
Roger Laporte
Inspector of Buildings

EXHIBIT "D"

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1672CV00467

CHRISTINA STEVENS, TRUSTEE OF
THE LIGHTHOUSE REALTY TRUST,
Plaintiff

Vs.

TOWN OF BOURNE ZONING BOARD
OF APPEALS, ET AL and
JAMES F. MOLLOY
Defendants

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AFFIDAVIT OF CHRISTINA STEVENS

I, Christina Stevens, Trustee of The Lighthouse Realty Trust and Plaintiff in the above-captioned action, do under oath depose and swear:

1. I, Christina Stevens, am the Trustee of The Lighthouse Realty Trust, which is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck in Bourne, Massachusetts.
2. I, as the owner of the property, have rented it for residential purposes since taking ownership.
3. On rare occasion, those that have rented the premises have held small weddings or wedding receptions on the property.
4. The Town of Bourne commenced a lawsuit against me in the Massachusetts Land Court regarding the use of the property by renters for weddings.
5. After entering into the Settlement Agreement, the Land Court case was dismissed and I believed this matter was resolved.
6. Since the time I entered into that Agreement with the Town, I have abided by that Agreement.

7. After hearing that the Zoning Board of Appeals had overturned my Agreement with the Town, I commenced a Superior Court action to appeal that decision.
8. Prior to Judgment being entered in that case, I entered into two rental agreements in which the individuals indicated they would be having weddings on the premises.
9. These weddings are in May and June of 2019 and comply with the terms set forth in my Agreement with the Town.
10. Since the Judgment entered, I have not entered into any rental agreements with anyone who has informed me of an intention to have any events, parties, weddings or functions because of said Judgment.
11. I have not been served with a Cease and Desist Order since I received the Cease and Desist Order in June of 2016 that mirrored the terms of the Settlement Agreement I entered into with the Town.

Signed and sworn to under the pains and penalties of perjury this 3rd day of May, 2019.


Christina Stevens

EXHIBIT "E"

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 16-467**

**CHRISTINA STEVENS, Trustee of the
LIGHTHOUSE REALTY TRUST,
Plaintiff**

VS.

TOWN OF BOURNE ZONING BOARD OF APPEALS, et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF JUDGMENT

The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust, brings this action, seeking to annul the September 14, 2016 decision of the Town of Bourne's Zoning Board of Appeals, ordering her to cease and desist permitting renters of her property from conducting weddings and other functions on her property. On August 22, 2018, a jury waived trial was conducted before this Court. The last of the post-trial briefs was filed on September 14, 2018.

FINDINGS OF FACT

1. The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust ("LRT"), is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck, in Bourne, Massachusetts. 0 Lighthouse Lane consists of vacant land, and 1 Lighthouse Lane contains a three-bedroom dwelling with an attached light tower. The property is located in the R-80 residential district in Bourne, which allows for use as a single family dwelling, along with

customary accessory uses.

2. The defendant, James F. Molloy, is the Trustee of 2 Westview Street Realty Trust, which owns 2 Westview Street in Bourne. He seasonally resides with his family at that address.

3. That property consists of single-family residence situated on 11,573 sq. ft. in the same residential zoning district as the plaintiff's property.

4. Both Molloy's property and the LRT property are located within a private residential community, known as "Lighthouse Point."

5. The plaintiff does not reside at either house at 1 Lighthouse Lane. She advertises her property for rent, and although she does not expressly advertise it for wedding purposes, her website contains frequently answered questions which indicate that functions are permitted under certain circumstances.

6. Third parties who have rented the LRT property have held events, including weddings on the premises. According to one of the neighbors, since 2005 there have been 21 weddings and three other events such as clambakes. At least one neighbor has also held a wedding reception, and other events, including an annual Fourth of July party at the Molloy home.

7. There are 13 houses with 10 families on the Neck. The weddings have resulted in increased traffic, parking congestion, trucks delivering food, music and noise.

8. The plaintiff does not accept additional payment from renters who choose to hold events on the property, and she is no manner involved the planning, preparing or hosting of such events.

9. By certified letter, dated January 15, 2013, the Town of Bourne zoning enforcement

officer, Roger Laporte, informed Stevens that the use and marketing of the Lighthouse property for weddings constituted a commercial use, which was unlawful under the Town's zoning bylaws, and to cease and desist all such use.

10. On or about June 25, 2015, the Town of Bourne, commenced an action through Mr. Laporte against LRT in the Massachusetts Land Court, Docket #15MISC0002323(HPS) requesting that the Court issue: (a) a declaratory judgment declaring that LRT is prohibited by the Bourne Zoning Bylaw from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; (b) a temporary restraining order prohibiting LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; and (c) a preliminary injunction enjoining LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises, including wedding receptions.

11. Following Case Management Conference held on August 27, 2015, the Land Court issued an order referring the Land Court action to dispute resolution screening.

12. On November 20, 2015, the parties to the Land Court action, along with several owners of neighboring properties, attended a mediation to resolve their dispute short of a protracted litigation. All in attendance offered their opinions. Following the mediation, the parties to the Land Court action continued settlement negotiations. Stevens, through counsel, submitted a proposed agreement for the resolution of this action. She anticipated that there would be a counterproposal from the neighbors, but none was filed.

13. Molloy moved to intervene in the lawsuit between the Town and Stevens, but said motion was denied by Land Court on April 13, 2016. The Land Court judge, at the time of

denying Molloy's request to intervene, noted that "if settlement is reached, as the parties indicate is likely to occur, allowing the continued use of the property in the manner for which zoning enforcement was sought, Mr. Malloy's interest may not be adequately represented by the Town of Bourne. In such case, Court directed plaintiff to direct the Building Inspector, with respect to any decision vacating, annulling or otherwise modifying the cease and desist order, to provide notice of same to Mr. Molloy, as well as any other direct abutters to Defendant [Stevens'] property."

14. At a Selectmen's meeting on or about May 27, 2016, the Selectmen voted to accept Stevens's proposal, and on June 2, 2016, a formal agreement was entered into between Stevens and the Town of Bourne, in full settlement of the dispute. This agreement was approved and signed by the Board of Selectmen after public hearing.

15. Pursuant to this agreement, the parties agreed to the following:

(a) a "function" shall be an event in excess of twenty-five (25) guests hosted by renter of the premises; a "renter" shall be an individual or individuals occupying the Property pursuant to a written rental agreement.

(b) LRT agrees to limit the number of the functions on the property to four (4) functions per year: one per month for the months of May, June, September, and October to limit the number of guests to one hundred (100).

© LRT agrees to require any renter of the property who holds a function to clean the area following the function; should any renter fail to do so, LRT will ensure the premises is free from debris after a function.

(d) LRT agrees to discuss with any renters prior to a function to establish the property

lines to which the guests are to remain during functions;

(e) LRT agrees to require entertainment at renters' functions to be shut down at 10 p.m.;

(f) LRT agrees to require that guests of any function be prohibited from using the beach; however, any renter shall be permitted to use the beach on any day during his/her rental period;

(g) LRT agrees to require a detail officer for any function that exceeds fifty (50) guests and further agrees to instruct the hired detail police officer as to the parameters that the guests are allowed to visit during the function, where cars are to be parked, and also to make clear that the beach is off limits for guests during functions.

(h) LRT agrees to notify the Town Administrator in writing 30 days in advance of any function which will exceed fifty (50) guests.

(i) the Town of Bourne agrees to dismiss the Massachusetts Land Court civil action with prejudice; and

(j) the Town of Bourne agrees to vacate the current (January 15, 2013) Cease and Desist Order on the property and to substitute in its place a cease and desist order that reflects terms of this agreement.

16. As a result of the agreement, on or about June 8, 2016, the parties filed a stipulation of dismissal dismissing the Land Court action with prejudice, without costs and with all rights of appeal waived. The plaintiff thought that this dispute was over as a result of this decision. Indeed, on June 23, 2016, in a letter signed by Mr. Laporte, the Town incorporated the terms of the agreement into a new cease and desist order replacing the prior order, and notified Molloy of his right of appeal under G.L. c. 40A.

17. On July 8, 2016, Molloy filed an appeal of the revised cease and desist order, pursuant to § 8 of Chapter 40A.

18. Stevens did not appear at the public hearing on this appeal on September 7, 2016, before the Town of Bourne Board of Appeals, believing that this matter had been resolved. In the interim, she had four weddings taking place at her property since the decision. The police were detailed once, but denied requests on several other occasions for details.

19. Following the public hearing, the Town Board of Appeals, on September 14, 2016, voted to grant Molloy's appeal, and overturned the 2016 enforcement order, substituting it with the 2013 enforcement order. It does not appear from the Board's decision that any new facts or information was before the Board than those that were raised and considered by the parties to the Land Court action (other than the settlement agreement), and presented during the mediation at which Stevens' neighbors appeared and participated.

20. Stevens had not appealed the issuance of the cease and desist order issued in 2013 to the Bourne Board of Appeals.

21. On or about October 4, 2016, LRT filed its complaint in this action, appealing the Board of Appeals September 14, 2016 decision. To date, the building inspector has not issued a new enforcement order.

22. Stevens continued to permit weddings to be conducted on the property after the issuance of the 2016 cease and desist order.

CONCLUSIONS OF LAW

The plaintiff argues that the defendant Molloy, as a citizen of the Town, and the Town

itself, was barred from any further action after the entry of a stipulation of dismissal in the Land Court and the resultant entry of a new cease and desist order, based on principles of *res judicata*. "The doctrine of [*res judicata* or] claims preclusion makes a valid final judgment conclusive on the parties and their privies and bars all further matters that were or should have been adjudicated in the action." *Heacock v. Heacock*, 402 Mass. 21, 23 (1988). This doctrine has three elements: (1) a prior final judgment on the merits; (2) sufficient identity of the causes of action; and (3) identity or privity of the parties. See *Acciavatti v. Professional Serv. Group, Inc.*, 982 F. Supp. 69, 80 (D. Mass. 1997). A stipulation of dismissal with prejudice as occurred in this case, constitutes "an adjudication on the merits as fully and completely as if the order had been entered after trial" for purposes of *res judicata* and collateral estoppel. *Gaffe v. Sullivan*, 1996 WL1186788 *2 (Mass. Super. Ct. Mar. 21, 1996), citing *Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. Ct. 153, 157-158 n.8 (1979).

Relying on *Morganelli v. Building Inspector of Canton*, 7 Mass. App. Ct. 475 (1979), the plaintiff argues that Molloy's interests were fully represented in the Land Court action, and, therefore, he was barred from further relief in the Zoning Board of Appeals. *Morganelli* applied the doctrine, sometimes referred to as the "doctrine of virtual representation," see *Matter of Liquidation of American Mut. Liability Ins. Co.*, 417 Mass. 724, 735 n.8 (1994), that a private individual whose interest in the enforcement of zoning laws has been represented in previous litigation by a public agency or official and who does not have rights specifically granted by the statute is thereafter barred from instituting his own litigation. In *Morganelli*, however, the Court noted that the plaintiffs had "no direct private right at all." 7 Mass. App. Ct. at 485. The Court further recognized that the *Morganelli* plaintiffs were not pursuing their limited statutory rights

under c. 40A, § 17. *Id.* at 485 n.16. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 18 Mass. App. Ct. 632, 635-636 & n.5 (1984).

In this case, once the new cease and desist order entered in 2016 after settlement and dismissal of the Land Court action, the defendant Molloy exercised his statutory rights under Chapter 40A, and, appealed the new order entered into as a result of the settlement. Therefore, he was not barred from that action by doctrine of claim preclusion. Indeed, the right of Molloy to pursue this appeal was explicitly recognized by the Land Court at the time it denied Molloy's motion to intervene.

This Court is concerned about the conflicting decisions in this case, and the apparent unenforceability of a Land Court decision and the contractual obligations incurred by the Town by virtue of the settlement agreement. Even the Board of Appeals in its September 2016 decision acknowledged the potential conflict. But, as the Board noted, the abutters had rights as aggrieved parties under c. 40A, who had been denied the opportunity to intervene in, and be bound by the Land Court action. See *Barkan v. Brown*, 2017 WL 5706108 (Mass. Land Court Nov. 27, 2017).

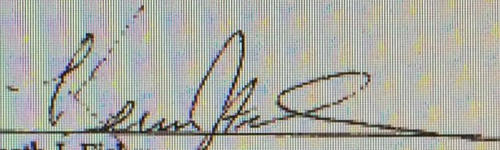
This Court further finds that Zoning Board of Appeals ultimate determination that the plaintiff's use of the property is not an accessory use allowed within the residential district is not an arbitrary and capricious decision. While no one contests that the rental of these properties is permitted, and that at least one wedding has occurred on another property, as well as annual parties at a different home, this Court cannot substitute its judgment for that of the Board of Appeals. *Caruso v. Pastan*, 1 Mass. App. Ct. 28 (1973). Although at least one other wedding had taken place in the neighborhood and annual gatherings also occurred, accessory use could have been determined not to be customary or incidental to the residential use. See *Bourne*

event modification.

Zoning By-law Section 2220 and Section V definitions. Accordingly, there is no basis upon which to find that the decision of the Zoning Board of Appeals must be annulled.

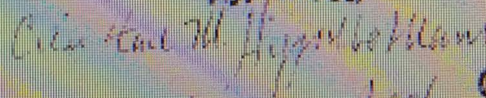
ORDER OF JUDGMENT

Based on the foregoing, it is hereby **ORDERED** that judgment shall enter for the defendant and against the plaintiff.


Kenneth J. Fishman
Justice of the Superior Court

DATED: November 28, 2018.

A true copy, Attest:


A 331 Clerk